UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, *et al*.

Plaintiffs,

v.

TYSON FOODS, INC., *et al*.

Defendants,

and

TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., GEORGE'S, INC., PETERSON FARMS, INC. SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC.,

Defendants/Third Party Plaintiffs,

v.

CITY OF TAHLEQUAH, *et al*.

Third Party Defendants,

and

CARGILL TURKEY PRODUCTION, LLC,

Defendant/Third Party Plaintiff,

v.

CITY OF TAHLEQUAH, *et al*.

Third Party Defendants

Case No. 05-CV-0329 TCK-SAJ

DEFENDANTS' RESPONSE AND OBJECTION TO
PLAINTIFFS' MOTION FOR LEAVE TO EXPEDITE DISCOVERY

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MISCELLANEOUS

Ironically, the State's motion for expedited discovery before a Rule 26 conference is both too little and too late. Too late because, ten months after starting this action, the State of Oklahoma still has not arranged a Rule 26 conference, still has not made any Rule 26 disclosures to defendants, and only now moves the Court to allow it to conduct "limited expedited discovery." Too little because, in seeking this extraordinary relief, the State provides virtually no details about what discovery the State intends to conduct, offers no factual support for the supposed urgency of this discovery, and neglects the very real biosecurity risks its anticipated discovery presents. The motion is also too little because it fails to give even notice, much less an opportunity to be heard, to the nonparties whose property the State apparently intends to invade. The State's fabricated urgency provides no good cause to avoid the Court's rules. The Court should deny the motion.[1]

RELEVANT FACTUAL BACKGROUND

1. The use of poultry litter as natural fertilizer and soil amendment has transformed the Illinois River Watershed (IRW) in Oklahoma and Arkansas from unproductive and fallow land into a bountiful agricultural area. This transformation rests, not on a "disposal" of "waste" as suggested by the State's motion, but on the wise use of a valuable resource in a beneficial and efficient way. Indeed, the poultry litter that poultry farmers produce but cannot use themselves is often sold to other farmers in order to "spread the wealth," both literally and figuratively.

2. Exercising their statutory and regulatory powers to protect natural resources, both Arkansas and Oklahoma regulate the type, timing, and amount of poultry litter that farmers can apply to crops. See, e.g., Okla. Stat. §§ 220-1, 2-8-77.1; Ark. Stat. §§ 15-20-901, -1001, -1101.

[1] The State's motion seeks only the Court's general leave to proceed with "limited" discovery; as discussed in section II below, the motion does not identify the specific discovery that the State intends to seek. Defendants reserve the right to object to any specific discovery request the State may propound, whenever that specific discovery may be sought.

Most poultry farmers operate under state-approved poultry litter management plans, and nothing in the State's motion suggests that these farmers have departed from these plans. Moreover, the State's own regulations already require farmers who land-apply poultry litter in the IRW to test samples of poultry litter and soils in land application areas for purposes of review by the Oklahoma Department of Agriculture, Food and Forestry (ODAFF). See, e.g., OKLA. STAT. tit. 2, §§ 10-9.7(E)(1), 10-9.18(A), 10-9.19(1), 20-10(G); Okla. Admin. Code §§ 35:17-5-7(c), 35:17-7-3(e), 35:17-7-4(d).

3. The defendants the State has joined in this case contract or previously contracted with independent farmers who conduct poultry operations in the IRW. These farmers run different numbers and sizes of poultry operations, use various feed formulations from the defendants, employ different contracts with the various defendants, and raise different types of birds. The farmers own the real property and the improvements on and in which the State presumably wishes to conduct its sampling. The State has not named any farmer as a defendant in this suit.

4. Every individual farm at issue in this case has different geographical, geological, hydrological, and operational characteristics that affect both its use and non-use of fertilizer and the consequences of that use. Some farms raise only poultry, while others raise beef or dairy cattle as well. Some farmers own pastures where poultry litter may be used, while many do not. Some farms are flat, while others are hilly. Some border the Illinois River or its tributaries, while others are miles away.

5. Surveys and published literature—including experts sponsored and funded by the State—have identified a number of sources in the IRW unrelated to poultry operations that release phosphorus, heavy metals, hormones, and bacteria into the Illinois River. These include

municipal water treatment plants, stream sediments, stream bank erosion, cattle, wildlife, septic tanks, and other State sources. See, e.g., Haggard, B.E., et al, "Phosphorus sources in an Ozark catchment, USA: Have we forgotten phosphorus sources from discrete sources?", Diffuse Pollution Conference, Dublin 2003, at 14-54 - 14-59 (2003) (wastewater treatment plants are a large source of phosphorus in the Illinois River Basin; impacts may persist after reduction of effluent phosphorus concentrations because the phosphorus in stream sediment can itself become a source) (Exh. 1); USGS (prepared in connection with the State of Oklahoma Office of the Attorney General), "Reconnaissance of the Hydrology, Water Quality, and Sources of Bacterial and Nutrient Contamination in the Ozark Plateaus Aquifer System and Cave Springs Branch of Honey Creek, Delaware County, Oklahoma, March 1999-March 2000" (2000)(sources of bacteria can include "cultivated agriculture, cow and horse on pasture, poultry production, households, and wildlife") (Exh. 2).

6. Beginning in May 2005, the State enlisted the ODAFF to try to obtain soil and water samples from poultry farms in the IRW. The putative purpose of this proposed voluntary sampling was "to provide assistance to applicators and producers in their performance of the Acts' requirements." See Cooperative Agreement at I(C) (Exh. 3). Other language in the proposed sampling Agreement revealed the real purpose of the sampling: to obtain discovery for the present federal court action and to repay ODAFF for its assistance in obtaining that discovery. See id. at II(B) ("The OAG will attempt to recover the costs of the sampling events through any settlement, court order, or other recovery as allowed by law.").

7. Oklahoma's poultry farmers raised concerns about the proposed sampling to ODAFF, and, in response, ODAFF held a meeting with them. ODAFF Memorandum of May 18, 2005. (Exh. 4) Afterward, ODAFF issued a memorandum outlining some of the procedures

and tests that it intended to employ in its proposed sampling. Id. The poultry farmers ODAFF had selected for sampling refused to voluntarily permit ODAFF to enter their properties for the purpose and under the conditions ODAFF proposed. Letter of Michael Graves, May 23, 2005. (Exh. 5)

8. Several months later, ODAFF asked the District Court for Delaware County to issue *ex parte* warrants granting it access to four poultry farms in Delaware County and within the IRW. See Applications for Statutory Administrative Warrants Allowing Entry to Premises, filed October 18, 2005. (Exh. 6). The four poultry farmers opposed the warrants on October 19, 2005. See Plaintiffs' Application (Exh. 7). The warrants were not returned by ODAFF within the time allowed, and expired on November 8, 2005. Administrative Warrants (Exh. 8).

9. The four poultry farmers targeted by ODAFF filed a declaratory judgment action against ODAFF. The poultry farmers claim that ODAFF is not vested with legal authority to conduct the sampling and testing that was contemplated by the warrants. *See* Petition for Declaratory Judgment, Temporary Restraining Order and Preliminary and Permanent Injunctive Relief (Exh. 9). The poultry farmers' lawsuit is pending in Oklahoma County as case CJ-2005-8975.

ARGUMENT

The State asks the Court to allow it "limited expedited discovery in advance of the Rule 26(f) discovery planning conference" and seeks to conduct unspecified physical tests of soil, water and waste from undisclosed locations for an unstated period by unnamed entities. Motion at 1. The Court should deny the State's motion for both procedural and substantive reasons.

I. Instead of Complying with the Rules, the State Tries to Create a False Urgency to Evade Rule 26.

A. The State offers no explanation of its failure to comply with Federal and Local Rules of Procedure.

The State as plaintiff had the duty to arrange a Rule 26(f) conference with all parties. Local Rule 16.1(b)(1)(A). As the State acknowledges, Motion ¶11, this conference was to occur "as soon as practicable." Fed. R. Civ. P. 26(f). The State also had the duty to assure that the Joint Status Report was submitted by October 11, 2005 (120 days from the date the State filed its lawsuit).[2] See Local Rule 16.1(A)(1).

Despite filing this action in June of 2005, however, the State has made no effort whatever to arrange a Rule 26(f) conference or prepare a Joint Status Report. Even today, the State has brought an emergency motion to avoid a Rule 26(f) conference rather than actually conferring in compliance with the Rule. Had the State arranged a Rule 26(f) conference and prepared a timely Joint Status Report, it would not be in the position of requesting the extraordinary relief of expedited discovery. The State's motion offers no explanation or excuse for this failure.

Likewise, despite the passage of ten months, the State has made none of the initial disclosures of information contemplated by Rule 26(a). Such disclosures would have provided defendants with crucial information, including the identities of persons knowledgeable about the State's claims, the nature and location of relevant documents, and the amount and nature of the State's claimed damages. Such information would have permitted defendants to address any State proposal for sampling with at least a modicum of understanding of the nature and purpose of that sampling. As it is, defendants face the State's proposal essentially in a vacuum.

[2] The State filed the original Complaint on June 13, 2005, but did not serve it on defendants. The State filed the First Amended Complaint on August 19, 2005.

Finally, despite its carefully worded attempt to suggest otherwise, the State has made no real effort to "meet and confer" with defendants before bringing this discovery motion as contemplated by the Rules. The State says that it conferred with one of the defendant's attorneys, Mr. Jantzen, Motion at 2, but (as in the present motion) the State provided no information about the specifics of the proposed sampling. Defendants submit that a party cannot fairly represent that it has met and conferred about a discovery dispute when it has not even told that party what discovery it seeks.

B. The supposed "urgency" of the State's request results entirely from the State's own conduct.

Even if the State were not in violation of the letter and spirit of the Court's rules, the State's own delay in bringing the current motion undercuts the supposed urgency of the need for sampling. First, the State sought backdoor discovery for this federal case through ODAFF, including *ex parte* administrative search warrants directed to nonparties without notice to the defendants here. Despite adamantly declaring to Judge Swinton that these efforts were "not related" to this action, the State now readily admits that it enlisted ODAFF to try to obtain samples from poultry farms for this action, first voluntarily, then by force of law. Only after these state proceedings failed did the State come back to this Court, hat in hand.

Even then, the State deliberately put off its motion to try to create a false sense of urgency. The State could have brought this motion months ago. The State had approached farmers about sampling in May of last year, and the warrants it obtained expired in November. Nevertheless, the State remained silent in this Court until mere weeks before it says it wants to sample at the farms, seeking to project the illusion of an unforeseen emergency. Most notably, the State did not raise the issue of sampling in responding to defendants' motion to stay, which would have been an obvious vehicle for discussing and addressing the subject.

Now, in March, the State asks the Court to waive Rule 26(f) so that it can conduct "urgent" sampling from non-parties that it knew it wanted last May and for which it issued search warrants last October. The State's current motion offers nothing that the State did not claim to know months ago. The fact that it may rain this spring and that farmers may fertilize their spring crops comes as no surprise to the State. The State has only itself to blame for its supposed "emergency" motion to avoid Rule 26(f).

Finally, the State's sudden rush for discovery after months of inaction is particularly inappropriate given the pendency of multiple motions to dismiss some or all of the State's claims as a matter of law. Should the Court grant some or all of those motions, the State's need for the requested discovery could be reduced considerably or eliminated entirely. Given the State's apparent intention to invade the rights and property of persons who are not even parties to this case, the Court should take a particularly hard and skeptical look at the rushed and ill-defined fishing expedition that the State proposes. At the very least, the Court's rulings on the pending dispositive motions will narrow the issues in the case and permit the Court and the parties to better evaluate the need for the as-yet-unspecified discovery that the State now seeks with such feigned urgency.

C. The law does not permit a party to circumvent Rule 26 merely to seek support for a preliminary injunction.

The State's effort to circumvent Rule 26 strikes at the very heart of the rule. The Rule 26 conference and disclosures aim to assure that all parties go into discovery with a clear understanding of the claims and defenses in the case. Based on that understanding, the parties "develop a proposed discovery plan" that accommodates all of the parties' views and proposals on the nature, scope, and timing of discovery. Fed. R. Civ. P. 26(f). Here, the State wants the Court's leave to pursue discovery without defining its claims beyond its vague complaint,

without providing defendants with relevant information that the State has seemingly already gathered, and without permitting the defendants sufficient time to conduct their own parallel testing or analysis to check the State's results.

The State's motion tries to justify its evasion of Rule 26 by hinting (without ever actually stating) that the State seeks expedited discovery to support an anticipated application for injunctive relief.[3] Other courts facing requests for expedited fishing expeditions on similar grounds have denied those requests:

1. Qwest Communications International, Inc. v. Worldquest Networks, Inc., 213 F.R.D. 418, 419 (D. Colo. 2003) (cited by State's motion). Court rejected plaintiff's request for expedited discovery to "determine whether it must file a motion for preliminary injunction."

2. In re Fannie Mae Derivative Litigation, 227 F.R.D. 142, 143 (D.D.C. 2005) (cited by State's motion). Plaintiff sought expedited discovery to establish a record on which to base a motion for preliminary injunction. The Court rejected plaintiff's request as a "thinly veiled attempt to circumvent the normal litigation process."

3. Dimension Data North America, Inc. v. Netstar-1, Inc., 226 F.R.D. 528, 530, 532 (E.D.N.C.) (cited by State's motion). The court rejected plaintiff's request for expedited discovery to "adequately prepare" for a hearing on a motion for preliminary injunction (threatened, but not filed). "The court finds that plaintiff will not be irreparably harmed by engaging in standard discovery procedure."

4. Sinclair National Bank v. Office of the Comptroller of the Currency, 2000 WL 34012862 (D.D.C.). A preliminary injunction was threatened, but not filed. "No authority provides . . . that expedited discovery for the purpose of enabling a plaintiff to determine whether to seek a preliminary injunction is contemplated by Rule 26. Id. at *4.

The argument against expedited discovery in the present case is even more compelling. In the cited cases, the parties seeking expedited discovery at least acted promptly in bringing their motions. In contrast here, the State initially tried to skirt the federal discovery process

[3] See, e.g., Motion at p. 2 ("need for urgency" is supported by alleged "evidence of the creation of imminent threats to human health"); see also ¶ 19 ("Defendants' waste disposal practices are causing human health to be endangered on a wide scale" and "are creating these imminent dangers to human health"). The State offers no factual support for any of its alarmist comments.

entirely. When that effort failed, the State deliberately delayed months in seeking relief in this Court. (Indeed, any motion for a preliminary injunction at this point would face the same obstacle as the motion for expedited discovery: if the need for an injunction is so urgent, why has the State delayed so long in seeking one?) The Court should deny the State's belated motion and require the State—like every other civil litigant—to comply with Rule 26.

II. The State's Failure to Specify the Discovery It Wants is Fatal to Its Request for Expedited Discovery.

Even if the State's Rule 26 problem were not self-inflicted and its urgency fabricated, the Court should nevertheless deny the State's motion because the State never describes in any but the most vague terms the expedited discovery it intends to pursue. Courts do not grant the type of extraordinary relief the State seeks here without knowing what discovery they are granting the movant leave to seek. See, e.g., Qwest, 213 F.R.D. at 420 (denying motion for expedited discovery based on, inter alia, breadth of discovery sought); Dimension Data, 226 F.R.D. at 532 (denying expedited discovery where requested discovery was "not narrowly tailored to a preliminary injunction determination").

A. The State's motion never defines what discovery the State wishes to conduct.

The State's most specific description of what it seeks talks about the "inspection of property … in order to secure samples of poultry waste, soil upon which such waste has been disposed, water which has runoff [sic] such fields during rain storms and water which has leached into the ground from these disposal fields." Motion at 11-12. The State talks about serving Rule 34 requests for inspection, but provides no copies of those requests. The State talks about serving Rule 45 subpoenas on nonparties, but provides no examples of proposed subpoenas. (Even if it had, the State has given no notice of the present motion to the nonparties on whom those subpoenas would presumably be served. The State cannot of course adjudicate

the rights of such nonparties without at least notice and the right to be heard.) The State's motion does not even include the usual proposed order, specifying precisely what the State wants the Court to do.

The State's omissions leave many unanswered questions that are critical to the Court's determination whether the State's request is reasonable and based on good cause. For example:

1. What type(s) of media would the State seek to sample? Surface soil samples? Soil borings? Surface water samples? Storm water runoff samples? Ground water samples? Temporary and/or permanent monitoring wells?

2. From how many farms would the State seek samples? The State itself alleges that the case involves "thousands of farms" in the IRW raising "millions of chickens and turkeys." First Amended Complaint ¶1.

3. From what farms would the State seek these samples? The State does not suggest that it plans to take expedited samples from each and every farm operation, yet the motion neither proposes specific farms nor suggests any criteria by which they would be selected.

4. When would the State attempt to gather samples (e.g., would the State wait for a thunderstorm)? Over what period of time would the samples be taken?

5. How many samples would the State seek from each farm?

6. What sampling plan or protocol would the State follow?

7. From what locations on the farms would the samples be sought? According to its motion, the State already has samples from the river and from the edges of adjoining fields. See Motion ¶3. This suggests that the State intends to take its new field samples from the centers of the fields, potentially a highly intrusive and disruptive plan. Again, however, the Court simply cannot know because the State has not said.

8. What constituents would the State analyze the samples for? The State's complaint alleges (without limitation) the presence of "phosphorus / phosphorus compounds, nitrogen / nitrogen compounds, arsenic / arsenic compounds, zinc / zinc compounds, copper / copper compounds, hormones, and / or microbial pathogens." First Amended Complaint ¶¶59, 62, 71.

9. What method(s) of analysis would the State use? The answer to this would of course depend on what would be analyzed and what it would be tested for.

10. What provisions would the State make for splitting samples with defendants?

11. What quality assurance and quality control procedures would the State employ?

12. Finally, how would whatever discovery the State might seek prevent the presumed "irreparable harm" on which the State's motion is premised? See, e.g., In re Fannie Mae, 247 F.R.D. at 142 (denying expedited discovery where movant could not show irreparable harm would result from lack of requested discovery).

B. The State's failure to identify the discovery it intends will unavoidably create the need for a second set of motions.

The State's failure to identify any of the details of the expedited discovery it wants to take makes almost inevitable a second round of motions and objections once the State reveals the discovery it actually seeks. Any grant of expedited discovery would thus impose additional burdens on the Court and the parties, burdens that would have been reduced or eliminated had the State simply come out and said in the current motion what it wants to do.

For example, the State's motion announces that the State wants to conduct intrusive and potentially destructive soil and water sampling on private property, but it fails to identify what private property it seeks to invade, much less provide the owners of that property with notice of its intentions. Once the State identifies the property, the property owners will of course have the right to raise their own objections to the State's scheme (e.g., breadth, burden, threats to

biosecurity, whether Rule 45's "inspection of premises" includes physical sampling). The State surely cannot suggest that it would have the right to enter property without affording the owners the notice and opportunity to be heard required by due process.

Likewise, by failing to describe beyond the vaguest of terms what discovery it would actually seek, the State necessarily delays the other parties' possible objections to that discovery. Once the State actually identifies what information it seeks to find and how it intends to obtain that information, the other parties will of course have the right to raise objections to that discovery based on relevance, burden, harassment, or any other valid ground.

III. The State Has No "Good Cause" for Expedited Discovery.

Even assuming for the sake of argument that the State had complied with Rule 26, brought a timely motion, and sufficiently identified the discovery it wishes to take, the Court should nevertheless deny the State's motion because the State has not demonstrated good cause.

A. The State must meet the Notaro v. Koch standard for expedited discovery.

As the State's motion acknowledges, in order to justify expedited discovery, the State must make a showing of "good cause" for such discovery. Motion ¶¶12-13. The appropriate test for good cause under the present circumstances is set out in Notaro v. Koch:

> In such circumstances, courts should require the plaintiff to demonstrate (1) irreparable injury, (2) some probability of success on the merits, (3) some connection between the expedited discovery and the avoidance of the irreparable injury, and (4) some evidence that the injury that will result without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted.

Notaro v. Koch, 95 F.R.D. 403, 405 (S.D.N.Y. 1982) (footnote omitted).

Notaro is the correct standard based on the nature of the "urgency" urged by the State. Although the State suggests it needs to sample now because defendants can change feed formulas (addressed below), the real source of the "urgency" argument is the supposed "evidence

of the creation of imminent threats to human health." Motion at 2; see also n. 3 above. In other words, the supposed exigency is not any need for expedited discovery, but the supposed need (despite the lack of any motion for a preliminary injunction) for an expedited resolution of the underlying merits of the case. The motion thus falls squarely within the Notaro holding:

> The plaintiffs herein do not seek an early deposition to protect the effectiveness of discovery. Plaintiffs contend that without expedited discovery and the resulting earlier trial they will suffer irreparable damage, which they assert establishes compelling need for expedited discovery.

Novato, 95 F.R.D. at 405.

The State asks the Court to apply a more relaxed "reasonableness" standard, considering factors such as "(1) whether a preliminary injunction is pending;[4] (2) the breadth of the discovery requests; (3) the purpose for requesting the expedited discovery; (4) the burden on the defendants to comply with the requests; and (5) how far in advance of the typical discovery process the request was made." In re Fannie Mae, 227 F.R.D. at 143. The State tries to justify application of this lower standard by pointing to its supposed "preparation for a preliminary injunction determination." Motion ¶14 (quoting Dimension Data).

This reliance is misplaced. The State's complaint does not seek a preliminary injunction. The State has not brought a motion for a preliminary injunction. At most, the State's current motion hints at such a possible request sometime in the future. The mere possibility of a future motion for a preliminary injunction does not justify expedited discovery. See Gucci America, Inc. v. Daffy's, Inc., 2000 U.S. Dist. LEXIS 16714, 2000 WL 1720738, *5 (D.N.J. 2000) (denying request for expedited discovery in absence of pending motion for preliminary injunctive relief); Qwest, 213 F.R.D. at 420 (denying expedited discovery and noting original

[4] Notably, the State's paraphrase of this list omits any mention of this first factor, which the State plainly cannot meet. See Motion ¶13.

complaint did not seek preliminary injunction). Compare Energetics Systems Corp. v. Advanced Cerametrics, Inc., 1996 U.S. Dist. LEXIS 2830, 1996 WL 130991, *2 (permitting expedited discovery in connection with previously filed motion for preliminary injunction).

B. The State fails to meet even the lowest standard for "good cause."

Regardless of which standard the court applies, the State's showing falls short of meeting the requirements for expedited discovery.

1. The State offers no factual support for most of its assertions.

Although the State's motion makes dozens of broad and often alarmist assertions of fact, the State has submitted in support only one professional journal article.[5] For the rest, the State simply makes bald statements without record support and asks the court to assume the statements to be true. Without supporting evidence, the State's motion does not make a showing of good cause; it makes only an assertion. See Black's Law Dictionary 1385 (7th ed. 1999) ("**showing**, n. The act or an instance of establishing through evidence and argument; proof").

The State offers no evidence of any imminent health hazard and no evidence that any grower has applied poultry litter in excess of its own applicable regulatory limits. The State's assertion of a health hazard actually directly attacks its own poultry-operation regulatory

[5] Even this lone article does not support the proposition for which it is cited. The quotation from Davis, et al. (Motion at 10, ¶16) does not "point to" poultry waste as the primary source of contamination to surface and groundwater. It simply states that if E.Coli. gets into an aquifer, the aquifer may become contaminated. Nothing in the paper suggests that poultry litter has contaminated or will contaminate groundwater aquifers. Moreover, published reports indicate that groundwater is not contaminated with bacteria. See ODEQ "The State of Oklahoma 2004 Water Quality Assessment Integrated Report" at 59-69, (showing no exceedances of groundwater water quality criteria for bacteria) (Exh. 10). Further, soil itself filters out bacteria in rainwater and significantly reduces bacteria concentrations before that rainwater reaches groundwater. Gerba, Charles P. et al. "Groundwater Pollution Microbiology," (1984). (Exh. 11)

programs, which specifically authorize application of poultry litter in amounts that the states' agencies have concluded do not pose a hazard to public health.[6]

The State makes other conclusory assertions without offering any factual support. These include:

- The assertion that defendants exercise control over farmers with respect to issues related to the State's claims. Motion ¶8. This question is one of the ultimate issues of law and fact for resolution in this case, and may vary from defendant to defendant and grower to grower. Yet the State's motion not only asks the Court to broadly prejudge the existence of such control, it asks the Court to do so without providing an iota of evidence.
- The assertion that "bacterial contamination in runoff from poultry waste applied fields is similar to contamination found in untreated human sewage." Motion ¶3. This assertion, obviously phrased to provoke maximum alarm, is not only unsupported but essentially meaningless. Background concentrations of bacteria in the environment can be very high. See, e.g., D.R. Edwards et al., "Fecal Coliform and Streptococcus Concentrations

[6] See Oklahoma Concentrated Animal Feeding Operations Act, OKLA. STAT. tit. 2, § 20-1 (2005) et seq.; Registered Poultry Feeding Operations OKLA. ADMIN. CODE § 35:17-5-1 (2005) et seq. ("The rules allow for the monitoring of poultry waste application to land or removal from thee operations and assist in ensuring beneficial use of poultry waste while preventing adverse effects to the waters of the state of Oklahoma."); Concentrated Animal Feeding Operations OKLA. ADMIN. CODE § 35:17-3-1 (2005) et seq. ("The rules . . . are designed to provide harmony within agricultural production while providing protection to the waters of the State of Oklahoma. . . ."); see also Arkansas Water and Air Pollution Control Act, ARK. CODE ANN § 8-4-101 (2005) et seq.; Arkansas Soil and Water Conservation Commission Act ARK. CODE ANN. § 15-20-201 (2005) et seq.; Arkansas Poultry Feeding Operations Registration Act ARK. CODE ANN. § 15-20-901 (2005) et seq.; Rules Governing the Arkansas Soil Nutrient and Poultry Litter Application and Management Program, 138-00-022 ARK. CODE R. § 2201.1 (2005) et seq. ("The Arkansas Soil and Water Conservation Commission developed this title to encourage prudent practices regarding the application and management of soil Nutrients and Poultry Litter to protect and enhance the State's surface water quality while allowing for optimum soil fertility and proper plant growth. The primary goal of this title is to maintain the benefits derived from the wise use of Poultry Litter . . . while avoiding unwanted effects from excess Nutrient Applications on the waters within the State.").

in Runoff from Grazed Pastures in Northwest Arkansas," (April 1997) (Exh. 12) (also rejecting any consistent relationship between manure application and runoff bacteria concentrations). Further, not all bacteria are necessarily disease-causing bacteria, as the State's motion implies. See Jerri V. Davis and Richard W. Bell, "Water Quality Assessment of the Ozark Plateaus Study Unit, Arkansas, Kansas, Missouri, and Oklahoma – Nutrients, Bacteria, Organic Carbon, and Suspended Sediment in Surface Water, 1993-95" (1998). (Exh. 13)

- The assertion that the Arkansas Department of Health has posted warnings against consumption of spring and stream waters due to the land application of poultry litter. In fact, defendants believe discovery will show that the Arkansas Department of Health posted these warnings due to grazing cattle that have direct access to those water courses.
- The assertion that the poultry litter somehow belongs to the defendants. Motion ¶4. In fact, poultry farmers own the litter generated by their farms.
- The assertion that the State's investigation and unnamed "scholarly research" suggests "that certain contaminants associated with the land disposal of poultry waste exist at levels within the environment such that they either pose a risk to human health or lead to the creation of chemicals which threaten human health." Motion ¶4. The State provides neither its own investigation nor the scholarly research.[7] In fact, the published literature demonstrates that there are no risks to human health. For example, the Beneficial Use Monitoring Report (BUMP) for 2002 stated with respect to Lake Tenkiller:

[7] The State's unsupported assertions also undercut their need for the very discovery they seek here. If the State is so certain from its undisclosed "investigation" and its anonymous "scholarly research" that harmful pollutants from poultry litter enter the IRW and the water supply, why does it need immediate and rushed sampling merely to demonstrate what it already knows?

> Results of metals sampling showed the lake to be fully supporting its FWP beneficial use and Public and Private Water Supply (PPWS) beneficial use based on metal (toxic) compounds in the water column. The Oklahoma Department of Environmental Quality (ODEQ) sampled the lake in 1999 as part of their Toxics Monitoring Program and detected no compounds at the ODEQ screening level or consumption advisory level. The lake is fully supporting its Fish Consumption beneficial use.

See Oklahoma Water Resources Board, "2002 Report of the Oklahoma Water Resources Board Beneficial Uses Monitoring Program" at 276 (2003) (Exh. 14). Likewise, published reports from public agencies have determined that the drinking water from the Lake Tenkiller reservoir is "excellent" and did not exceed criteria for bacteria, metals, or chlorination byproducts.[8]

Most of the State's assertions necessarily rely on expert opinions, yet the State provides no expert support for any of them. Either the State does not have any expert support for its positions or is unwilling to submit that support to the Court for review. Either way, the State has utterly failed to support its motion.

2. The State's most critical "urgency" arguments are factually wrong.

Most of the assertions that are critical to the State's argument that sampling must be done now are not only offered without support, they are demonstrably wrong. For example:

- The State asserts without support that most land application of poultry litter occurs in the spring and early summer. Motion ¶¶ 4, 5. In fact, poultry litter is applied as fertilizer at various times throughout the year, when additional forage for grazing animals is needed and based on the applicable growing season for the predominate pasture grass species being used. See e.g., Exh. 15, University of Arkansas "Forage and Pasture, Forage Management Guides," at http://www.aragriculture.org/

[8] See, e.g., Sequoyah County Times, September 14, 2005 (quoting the Gore Public Works Authority's Annual Water Quality Report for 2004) (Exh. 16).

forage_pasture/Management_Guides/Forages_Self_Help_Guide8.htm (explaining that cool-season grasses are fertilized in the spring and late summer or early fall to match livestock need and that warm-season grasses, such as Bermuda grass, are fertilized in late spring and after each harvest as needed); see also Exh. 17, Oklahoma State University, "Nutrition and Management Considerations for Preconditioning Home Raised Beef Calves," at http://osuextra.okstate.edu/pdfs/F-3031web.pdf (describing pasture preparation in late August for preconditioning calves during Fall).

- The State asserts without support that spring is the "rainy season" in the IRW. Motion ¶¶ 4, 5. In fact, a 30-year review of county-by-county rainfall records shows that in Delaware County (the locus of the State's sampling efforts) the month of heaviest rainfall is August. See The Oklahoma Climatological Survey, 1971-2000, University of Oklahoma. (Exh. 18). The average rainfall for spring in Delaware County is 14.1 inches; for fall, 14.4 inches. Id. Likewise, studies at Tahlequah show that large precipitation events are relatively infrequent and are evenly distributed between the different months of the year. Thus, contrary to the State's assertion, a significant rain event is no more likely to occur during the March-June time period than any other time. See Exh. 19, OCS, Cooperative Station Summary, Tahlequah, Station 348677 (2006) at http://climate.ocs.ou.edu/county_climate/products/coop_summaries/OK8677_stnsum.html (accessed on March 13, 2006).
- The State asserts without support that "the spring months" "coincide[] with periods of heavy recreational use of the IRW." In fact, the recreational season for the IRW stretches from May to October, with peak use of the river during the summer on

weekends. See, e.g., Nolen, Ben M. and Bob Narramore, "Rivers and Rapids: Canoeing, Rafting, and Fishing Guide: Texas, Arkansas, Oklahoma" (2000) (noting the "float" season in the IRW is from May 1 to October 1) (Exh. 20); see also www.shopoklahoma.com/ illinoir.htm (explaining that "on a typical hot, summer day, hundreds of canoeists and rafters will be on the river. The weekends are the very crowded times."). (Exh. 21)[9]

In sum, the State's claim of urgency rests on a foundation of assumptions about litter application, weather, and recreational use that cannot stand in light of easily ascertainable facts.

3. The State's efforts to test in the fall belies its assertion that spring testing is necessary.

The State's own conduct demonstrates that spring is not a critical period for sampling. The State's motion claims that the samples the State wants are "best sought during the months of March-June." Motion at 2. In its pursuit of soil and water sampling through ODAFF last year, however, the State sought to enter and sample poultry farmers' farms in the fall, and in fact obtained warrants that were only valid through November 2005. Fall sampling was obviously good enough for the State last fall, and the State's motion offers no explanation of what has changed since then, either in the farmers' practices, or in the state's weather patterns or in the laws of chemistry and physics. The State's urgency to test in March-June is plainly fabricated and cannot justify expedited discovery.

[9] The water and air temperature are generally not warm enough for swimming in the IRW in the spring. See, e.g., NOAA, "Unedited Local Climatological Data - Tahlequah Municipal Airport (1955-2005)" (2006) at http://cdo.ncdc.noaa.gov/ulcd/ULCD (showing that the average air temperature does not reach the 80s until July and August); http://nwis.waterdata.usgs.gov/usa/nwis/qwdata/?site_no=07196500 (same for water temperatures).

4. There is no threat of spoliation of evidence.

The State also briefly raises a spoliation-of-evidence-type argument, claiming that the defendants may change "[t]he feed formula" for poultry and that the State therefore needs to act now to obtain "unadulterated" samples. Motion ¶ 7. This argument fails for several reasons.

First, the argument is entirely speculative. Even the wording of the State's motion demonstrates this: the State asserts that feed formulas "can be changed" by defendants and argues that such a change "may change the content of the waste and may make it more difficult to track the waste." Motion ¶ 7 (emphases added). This type of a claim, however, could be made by almost any litigant in any action. Parties always possess evidence that might be altered, and that alteration always might impede the investigation of the opposing party. The extraordinary remedy of expedited discovery requires more than the mere speculation that another party may take some action affecting evidence. Such speculation, however, is all the State offers here, and it cannot support the State's motion. Compare Pod-Ners, LLC v. Northern Feed & Bean of Lucerne Ltd. Liability Co., 204 F.R.D. 675, 676 (D. Colo. 2002) (granting motion for limited expedited discovery where beans "will be sold or otherwise distributed" prior to regular discovery).

Second, the State's argument mistakenly assumes that the defendants employ a single, static "feed formula." In fact, poultry feed formulations vary from company to company, and vary over time within a single company. Formulations are constantly assessed and revised in a continuing effort to identify an optimum mix of ingredients. The State also mistakenly assumes that a theoretical change in the feed formula would result in an immediate change in the composition of the litter distributed on fields. In fact, as the State's motion acknowledges

elsewhere, litter often accumulates for months in poultry houses, and is often stored for months more after it is removed from those houses.

Third, the State's argument asserts, not that defendants will "adulterate" evidence that exists now, but that they may improperly change formulas in the future so as to create different evidence. This is not spoliation, and the State cites no authority for compelling defendants to continue producing evidence of the same character. To the extent the defendants' feed formulas are relevant to the State's claims, the defendants have records of those formulas and the State can attempt to obtain them in the course of ordinary discovery.[10]

D. The State's implication that defendants have improperly pursued discovery is wrong.

The State's motion tries to imply that defendants have been improperly obtaining discovery while the State has been stymied. See Motion ¶ 2 n.1. This implication is disingenuous at best.

The State has been actively pursuing sampling information for this case since long before it even served defendants with the complaint. In the spring of 2005, without notice to defendants or to farmers, the State set up testing and sampling stations at the edges of farmers' fields. Motion ¶ 3. Moreover, as discussed above, the State has tried to use ODAFF first to persuade and then to coerce farmers to permit soil and water sampling on their farms, again without notice to defendants.

In light of these efforts, the State's suggestion that defendants acted improperly in seeking what the State calls "discovery" by making requests under the Open Record Act of Oklahoma cannot withstand scrutiny. State agencies must comply with such requests for public

[10] Any such discovery would, of course, need to account for the fact that poultry feed formulations are proprietary, closely-guarded trade secrets.

records under this Act whether litigation is pending or not. See, e.g., Okla. Stat. §§ 51-24A-2, -5v1. Moreover, the State's report of defendants' Open Records efforts is selective and incomplete. The State fails to tell the Court that it has involved its outside counsel in the present case in responding to defendants' Open Record requests, a highly unusual step in what should be a routine agency procedure to provide public records. The State also fails to mention another unusual step: the removal from the office of a state agency of all files responsive to the defendants' request. Finally, the State's motion fails to inform the Court that, because of delays by the State, defendants have received only a minimal number of documents and have not received *any* documents from ODAFF, the agency with direct regulatory authority over the issues raised in the State's complaint.

IV. The State's Proposed Sampling Fails to Provide for Essential Biosecurity.

When poultry die or fail to thrive, both farmers and the companies suffer serious financial losses. Poultry farmers are responsible for raising birds owned by the poultry companies, and their return on their investment depends entirely on their success in raising healthy birds. Should a poultry farm be stricken with disease, the poultry farmer could face enormous financial losses. As the owners of the birds, the poultry companies likewise lose their investments should birds fail to thrive for any reason.

Biosecurity is thus critical both to poultry farmers and poultry companies. Because the State has not identified exactly what it wants to do or where and how it wants to do it, this response can address the issue of biosecurity only in general terms. Although poultry farmers whose farms would be invaded will doubtless raise their own biosecurity concerns if and when the State reveals what sampling it actually wants to do and where it wants to do it, a number of concerns are already apparent.

A. Breach of biosecurity is a very real risk on Oklahoma and Arkansas poultry farms.

The peril posed by breaches of biosecurity at poultry farms is immense. In 2005, Avian infectious laryngotracheitis ("ILT") was diagnosed on many poultry farms in Arkansas and in Eastern Oklahoma. ILT is a highly contagious respiratory disease, and mortality rates can reach 50%. Birds that do not die suffer from symptoms that include conjunctivitis, coughing, and lack of appetite.[11]

To prevent the further spread of the ILT virus, poultry companies and farmers have established biosecurity programs that are, essentially, quarantines. These programs go far beyond the unspecified state-promulgated standards that the State promises to obey. For example, all of the Defendants enforce a "72-hour rule," meaning that any person who has visited a poultry farm cannot visit another poultry farm within the next 72 hours. If ILT or other infectious disease is in the area of a poultry farm, some enhances the 72-hour rule by expanding it to five days, by including vehicles and equipment, and/or by forbidding any contact with a poultry farm in an area of infectious disease outbreak.

Access to the birds themselves is even more restricted. In areas that are not subject to an infectious disease outbreak, only (1) the poultry farmer who owns the house and (2) a field technician from the company that owns the birds are permitted access to the poultry house. In areas where ILT or other diseases are present, only the farmer is permitted to access a poultry house. Even company representatives cannot enter.

[11] Avian infectious laryngotracheitis is *not* related to Avian Influenza H5N1, the "bird flu" that is spreading through Africa, Asia and Europe. There are no reports of bird flu infections in the United States at this time.

B. The State's motion all but ignores biosecurity.

The State's motion makes only a cursory reference to biosecurity, stating that it is "cognizant" of biosecurity and that its activities will be in accordance with "applicable standards and procedures promulgated by the state agricultural authorities." Motion ¶10. In its state court proceedings involving the attempted ODAFF sampling, the State likewise expressed its intent to apply its own biosecurity protocols, which it deems to be "proper" and "appropriate." Response to Motion of Jim L. Pigeon and Michelle R. Pigeon to Quash or Modify at pp. 12-14. (Exh. 22). The State claims that it is the sole entity that can determine "if and when an ILT outbreak precludes sampling and testing on Respondents' farms." Id. at fn. 17.

Beyond this lip service, however, the State's motion proposes no specific biosecurity measures and does nothing to address the real-world concerns discussed above. Indeed, because the State has yet to identify the scope of the sampling that it proposes, neither the Court, nor the defendants, nor the farmers could evaluate the efficacy of such a proposal in any event.

The State has no direct financial investment in poultry or poultry farms. Should the State's consultants inadvertently spread disease during sampling attempts, only poultry, poultry farmers, and poultry companies will suffer. Because the State has no vested interest in biosecurity, defendants ask that any sampling that may be permitted at any point be conducted under the biosecurity protocols established by and actually enforced on the individual poultry farms, and not simply under whatever standards have been set by "state agricultural authorities."[12]

[12] ODAFF regulations seemingly require this in any event. See Okla. Admin. Code 35:17-3-24 ("If direct contact with animals or animal quarters becomes necessary, disease prevention measures outlined by the owner will be followed by the inspector.").

CONCLUSION

The State's motion fails both procedurally and substantively. The State has failed its obligations under Rule 26, taken detours into state court to avoid this Court's reasonable restrictions, and consciously delayed asking this Court for relief. All of this aimed to create a false sense of urgency that the State hopes will induce the Court to grant it leave to conduct some as-yet undefined discovery. The State's motion offers no facts in support of any of its crucial and over-the-top assertions, many of which are simply false. The motion also glosses over the fact that the State apparently intends to seek forced access to private property owned by persons who are not even parties to this litigation.

The State's motion relies entirely on bald assertion and unsupported speculation, which cannot justify excusing the State from its obligations as a litigant or granting the extraordinary relief of expedited discovery. The Court should deny the State's motion.

Respectfully submitted,

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